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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-72-24

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[redacted],

KOPPERS COMPANY, INC.,
Petitioner,

vs.

A. BATTLE RODES, Trustee of Tennessee Central Railway Company, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-.....

IN THE MATTER OF TENNESSEE CENTRAL RAILWAY COMPANY,
Debtor,
KOPPERS COMPANY, INC.,
Petitioner,

vs.

A. BATTLE RODES, Trustee of Tennessee Central Railway Company, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above case on February 2, 1972. A timely petition for rehearing was denied on April 4, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals and the opinion of Judge Paul C. Weick dissenting from the denial of rehearing have not been reported officially as of this date; however, they are set out in the Appendix of petition No. 71-....., filed by Petitioner LOUISVILLE AND NASH-

VILLE RAILROAD COMPANY, *et al.*, in the same MATTER, at pages A-1 and A-16 respectively. The opinion of the District Court is set out in the Appendix of petition No. 71-..... at page A-21, and is reported at 316 F.Supp. 1103. The judgment of the District Court is set out in the Appendix of petition No. 71-..... at page A-47.

JURISDICTION

The opinion and order of the Court of Appeals for the Sixth Circuit was entered on February 2, 1972 and is contained in the Appendix of petition No. 71-..... at page A-1. A timely petition for rehearing was denied on April 4, 1972 and copies thereof are appended to petition No. 71-..... at page A-53. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the repeal, in the Reorganization Act of 1966,[1] of 15 U.S.C. §603, which expressly denied governmental priority under R.S. 3466 to RFC loans of the type herein involved, nine years after the abolition of the RFC[2] and transfer of RFC notes to the Secretary of the Treasury, suddenly create for the United States a priority status which they had not enjoyed before on RFC notes?

2. Is R.S. 3466 (31 U.S.C. §191) applicable to the essentially equitable railroad reorganization proceedings under §77 of the Bankruptcy Act?

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1. Pub. L, 89-554, §8 (a) (Schedule of Laws repealed), Sept. 6, 1966, 80 Stat. 378 (Recodification of Title 5).

2. Reorganization Plan No. 1, 1957, June 30, 1957, 22 F.R. 4633, 71 Stat. 647.

3. A third question was pretermitted by the Court of Appeals:[3]

> Are claims of creditors occurring within six months before institution of reorganization proceedings under §77 accorded priority in such proceedings under equitable principles, ahead of mortgagee claims, irrespective of whether or not there was diversion of current income?

4. Is this Petitioner's lien which is granted by Tennessee Statutes (Tenn. Code Ann. §§65-1011, -1013, -1016, -1021 (1964)) superior to the mortgage lien of the United States?

STATUTES INVOLVED

The pertinent section of §77 of the National Bankruptcy Act (11 U.S.C. §205); R.S. 3466 (31 U.S.C. §191); 15 U.S.C. §603; the pertinent sections of Reorganization Plan No. 1 of 1957, effective June 30, 1957, 22 F.R. 4633, 71 Stat. 647; and Tennessee Statutes §65-1011, -1013, -1016, -1021. Section 77 (b) of the Bankruptcy Act (11 U.S.C. 205(b)), R.S. §3466 (11 U.S.C. §191) and the Tennessee statutes are set forth in this Petitioner's Appendix, pages A1-A3. The remaining statutes involved are set forth in the Appendix of petition No. 71-.....

STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the Middle District of Tennessee was invoked by the filing of a petition for reorganization under §77 of the Bankruptcy Act by Tennessee Central Railway Company on December 14, 1967. We rely on the Statement of the

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3. The District Court held in Petitioner's favor on this question and Judge Weick, dissenting in the denial of the petition for rehearing, concurred.

Case of Petitioner, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *et al.*, which is set forth in petition No. 71-..... at page 4 with the following additions. Koppers Company, Inc. has submitted a claim of approximately one hundred twenty-one thousand dollars ($121,000) based upon the furnishing of cross ties to the Tennessee Central Railway during the year preceding the petition for reorganization and during the period in which the railroad was on the brink of financial collapse. Cross ties were needed to replace worn out, rotten and otherwise unserviceable cross ties and were absolutely essential for the continued operation of the railroad which was in the public interest, and without them the railroad could not have been sold as a going concern in Bankruptcy Court. Officials of Koppers Company were aware of the precarious financial condition of Tennessee Central Railway and extended credit in reliance on the equitable principle set forth in *Southern R.R.* v. *Flournoy*, 301 F.2d 847 (4th Cir. 1962) which extended priority to certain claims of creditors who had extended credit to a railroad within six months of the railroad's entering into bankruptcy.

This Petitioner also relies on Tennessee Statutes 65-1011, *et seq.* (see this Appendix pages A1-A3) which grant a lien to materialmen who furnish cross ties or other building materials to a railroad. This lien was not perfected by its reduction to judgment, only because of an injunction of the District Court for the Middle District of Tennessee holding all matters regarding the railroad's financial status in abeyance pending disposition of the reorganization proceeding. (See the relevant section of the District Court's Order, this Appendix page A3). The claim of this Petitioner was conceded to be a valid debt. However, if the priority claimed by the United States is sustained, this Petitioner will receive nothing on its claim of $121,051.12.

The District Court held that R.S. 3466 (31 U.S.C. §191) was inapplicable to railroad reorganization proceedings under §77 of the Bankruptcy Act. The Court held this Petitioner was afforded priority under the applicable Tennessee lien statute (and, apparently, that this Petitioner was afforded priority as a six-months creditor as well).

On appeal the decision was reversed. The Court of Appeals held that R.S. 3466 controlled and that the liens of Koppers Company, Inc. were merely general ones, not perfected, and that R.S. 3466 gives priority to the United States. A timely petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

Comes the Petitioner Koppers Company, Inc. urging that R.S. 3466 (31 U.S.C. §191) is inapplicable to the essentially equitable proceedings[4] of a railroad reorganization under §77 of the Bankruptcy Act and that R.S. 3466 does not now grant a priority to the Government for loans made by the Reconstruction Finance Corporation when this priority was expressly denied by Congress until the recodification of Title 5 of the United States Code in 1966. As to these issues we rely on the Reasons for Granting the Writ as set forth in the Petition of Petitioner LOUISVILLE AND NASHVILLE RAILROAD COMPANY Petition No. 71-..... There the importance of the questions involved is well presented and the need for this Court to settle these questions of federal law is well indicated.

This Petitioner also claims priority over the United States by reason of Tennessee Statutes (Tenn. Code Ann. §§65-1011, -1013, -1016, -1021) (See this Appendix pages A1-A3) which subordinate the mortgage lien of the Government to the lien of Koppers Company, Inc. The District

4. See §77(b) of the Bankruptcy Act (11 U.S.C. 205(b)), this Appendix at page A1.

Court determined that Koppers Company, Inc. was entitled to priority under the applicable Tennessee lien statute, since the underlying principle of a §77 reorganization is that it is an equitable proceeding. The Court of Appeals reversed, holding that the lien of this Petitioner was not perfected by a reduction to judgment and therefore, this Petitioner is relegated to a non-lien position such that the Government has priority under R.S. 3466. But, as the District Court observed, the perfection of the lien by its reduction to judgment was not accomplished due to the injunction of the District Court holding such matters in abeyance until the disposition of the reorganization proceeding. Legal scholars have recognized that a statutory lien may be perfected subsequent to the filing of a petition in bankruptcy. (See 4 *Collier on Bankruptcy*, §67.20 at 213-14). This principle is even more applicable in §77 proceedings, which are equitable in nature.

> "Insofar as §67b of the Bankruptcy Act provides for the validity of statutory liens as well as their perfection, if necessary, after the filing of the petition, it would seem evident that such provision would apply under §77 since there is nothing inconsistent therein with the terms of the latter section . . . ."
>
> 5 *Collier on Bankruptcy*, §77.21 at 569.

In *Mercantile Trust Co.* v. *Tennessee Central Ry.*, 286 F. 425 (1922), the District Court for the Middle District of Tennessee decided that in a reorganization of the Tennessee Central Railway the creditors, under the provisions of Chapter 72 of the Acts of 1877 (now Tenn. Code Ann. §§65-1011, *et seq.*) were entitled to the statutory priorities of the claims were "admitted by the receivers to be due." The claim of Koppers Company was conceded to be a valid debt. This Petitioner submits that the cases relied on by

the Court below in reversing the District Court did not involve railroad reorganization proceedings and thus, did not consider the equitable nature of the proceeding.

The decision of the Court below has determined important questions of federal law. These questions are ones of vital importance to the railroad industry and its creditors. The decision will likely affect the very nature of a §77 railroad reorganization proceeding, and Petitioner respectfully submits that the question should be settled by this Court. Numerous railroads have experienced financial difficulties in recent years and the TENNESSEE CENTRAL experience is neither novel nor is it unlikely that similar situations will arise again. Creditors of railroads understandably will be hesitant to grant the much-needed credit necessary for a railroad's operation of R.S. 3466 is applied to §77 Railroad Reorganization proceedings to the detriment of claims not reduced to judgment and possession. The District Court (J. Miller, Circuit Judge, sitting by designation) and Judge Weick (dissenting in the denial of rehearing) recognized the importance of the equitable nature of §77 proceedings. Judges Edwards and Peck determined that R.S. 3466 applies. This Petitioner respectfully submits that the discretionary jurisdiction of this Court should be exercised to settle these questions which involve important legal and equitable considerations in the implementation of railroad service to the public.

If this Court elects to pass on the question as to the rights of certain creditors under the equitable "Six-Months Rule", this Petitioner also requests that the Court would so indicate to allow Petitioner opportunity to fully brief the issue.

CONCLUSION

For the reasons set forth above and in petition No. 71-....., it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Pertinent Statutory Provisions

We rely on the Appendix of Petitioner LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *et al.*, petition No. 71-..... for the listing of some of the pertinent statutory provisions with the following additions:

Section 77 (*b*) of the Bankruptcy Act (11 U.S.C. 205 (b)) — . . . For all purposes of this section unsecured claims, which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a federal court on the day of the approval of the petition, shall be entitled to such priority and the holders of such claims shall be treated as a separate class or classes of creditors . . . .

R.S. §3466 (31 U.S.C. 191)—Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

65-1011, T.C.A. Lien of subcontractors, laborers, materialmen or other persons.—Every subcontractor, laborer, materialman, or other person who performs any part of the work in grading any railroad company's roadway, or who constructs or aids in the construction or repairs of its culverts and bridges, or furnishes cross-ties or masonry or

bridge timbers for the same, which is used in the building and construction of such railroad, its bridges and culverts, or who lays or aids in the laying of its track, building of its bridges, the erection of its depots, platforms, wood or water stations, section houses, machine shops, or other buildings, or for the delivery of material for any of these purposes, or for any engineering or superintendence, or who performs any valuable service, manual or professional, by which any such railroad company receives a benefit, all and every such person or persons at election shall have a direct lien on such railroad, its franchises and property, for the value of such work and labor done or material furnished or services rendered as hereinbefore set out and specified, in as full and ample a manner as is provided by §65-1001 for persons contracting directly with such railroad company for any such work and labor done or for materials furnished. [Acts 1891, ch. 98, §1; Shan., §3580; mod. Code 1932, §8002.]

65-1013, T.C.A. Duration of lien of subcontractors, laborers, materialmen and other persons.—Said lien shall continue for the space of one (1) year from the service of said notice, and until the termination of any suit, commenced for the enforcement within said one (1) year; and said lien shall have priority over all other liens on such railroad, its property and franchises. [Acts 1891, ch. 98, §1; Shan., §3582; mod. Code 1932, §8004.]

65-1016, T.C.A. Contractors, subcontractors, laborers, materialmen and other persons—Priority of lien.—No railroad company shall have power to give or create any mortgage or other kind of lien on its railroad, its property or franchises, in this state, which shall be valid and binding against any judgments or decrees, or execution issued thereon, rendered in any of the courts in this state, for the enforcement of any liens provided for in §§65-1001—65-1017; nor shall the liens created by §65-1011 be hindered,

postponed, delayed, or defeated by any contract, real or pretended, made by any railroad company with any principal or construction company, real or pretended. [Acts 1891, ch. 98, §4; Shan., §3585; Code 1932, §8007.]

65-1021, T.C.A. Judgments for timbers, work, or damages to person or property—Priority over mortgage or other lien.—No railroad company shall have power to give or create any mortgage or other kind of lien on its railway property in this state, which shall be valid and binding against judgments and decrees, and executions therefrom, for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of its railroad in this state. [Acts 1877, ch. 12, §3; 1877, ch. 72, §3; Shan., §1530; Code 1932, §2587.]

United States District Court For The Middle District of Tennessee, Nashville Division, ORDER, Dec. 14, 1967

....

All persons, firms, and corporations, whatsoever and wheresoever situated, located, or domiciled, be, and they are hereby, restrained and enjoined from interfering with, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, railroads, property, or premises belonging to, or in the possession of the debtor, or from taking possession of, or in any manner interfering with the same, or any part thereof, or from interfering in any manner with the operation of its railroad or properties or the carrying on of its business by the debtor under the orders of this court, or from bringing any new suits, actions, or proceedings on causes of action accruing prior to this date in or before any court, commission or tribunal from which an appeal, or proceedings to review, can be taken only upon the filing of an appeal bond as a jurisdictional or mandatory requirement.